Office-Supreme Court, U.S.
FILED
MAR 10 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1963

No. 902

S. STERN & COMPANY,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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S. Stern & Company, now a sole proprietorship[1] and petitioner herein, respectfully prays that a writ of certiorari issue in the above captioned case directed to the United States Court of Customs and Patent Appeals to review its order of affirmance dated and entered December 12, 1963.

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1. When this action was instituted in the Customs Court *sub nom.* S. Stern Henry & Co. v. United States, there were three partners. The death of one of the partners after the order of the Customs Court, but before the argument in the U. S. Court of Customs and Patent Appeals, resulted in the amendment of the caption to its present form. The change was made on motion of petitioner granted by the Court of Customs and Patent Appeals on October 22, 1962. After the decision by the U. S. Court of Customs and Patent Appeals, James B. Herzog, one of the remaining partners, died. Thus, the petitioner is no longer a partnership except as it may be considered such in liquidation. So that the Court is not misled, the business of the former partnership is being continued by a successor enterprise, but such successor enterprise is not involved in the instant proceeding.

Opinions Below

The opinions of the United States Customs Court, Third Division, are reported in 48 Cust. Ct. 430, and 49 Cust. Ct. 167 and appear in the Record (18-26, 34-39). The opinion of the United States Court of Customs and Patent Appeals is not yet officially reported and is appended hereto (App. A1-10).[2]

Jurisdiction

The decision of the United States Court of Customs and Patent Appeals sought to be reviewed was dated and entered December 12, 1963. The final mandate on such decision was issued on January 20, 1964. The time within which this petition for a writ of certiorari might be filed will expire on March 11, 1964.

The jurisdiction of this Honorable Court is invoked under Title 28 United States Code, section 1256.

Questions Presented

1) May the United States Customs Court deprive petitioner of his right to appear in person and conduct his own litigation especially when 28 U.S.C.A. 1654 and Rule 9 of the Customs Court rules specifically grant petitioner such right.

2) May the Customs Court ignore the specific provision of 19 U.S.C. 1483 (Tariff Act of 1930, §483) and the here-

2. Parenthetic references so noted refer to the appendix hereto annexed.

tofore uninterrupted line of decisional authority establishing petitioner's status and rights as the real party in interest, for the sole purpose of barring the appearance of the petitioner in person and preventing him from conducting his own litigation?

3) May the Customs Court hold, contrary to 19 U.S.C. 1514 and 1515, that if petitioner insists on appearing in person then petitioner is not the real party in interest and has no standing to appear in person before that court and may not litigate his protest on the merits, but if petitioner retains a member of the customs bar to represent him, then petitioner is the real party in interest and may litigate his protest on the merits?

4) May the Customs Court be permitted to discriminate among individuals who are all consignees and all of whom have the same rights and liabilities under the Tariff Act of 1930, so as to arbitrarily grant some of such consignees the right to appear before it in person and arbitrarily deny such right to others without any statutory or decisional authority for such discrimination?

5) May the Customs Court be permitted to deprive petitioner of the equal protection and availability of 28 U.S.C.A. 1654 and Rule 9 of its own rules in violation of the Fifth Amendment to the United States Constitution?

Constitutional Provisions Involved

Amendment V of the Constitution of the United States:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *"

Statutes Involved

19 U.S.C. 1483:

"For the purposes of this subtitle—
(1) All merchandise imported into the United States shall be held to be the property of the person to whom the same is consigned; and the holder of a bill of lading duly indorsed by the consignee therein named, or, if consigned to order, by the consignor, shall be deemed the consignee thereof."

19 U.S.C. 1485(d):

"A consignee shall not be liable for any additional or increased duties if (1) he declares at the time of entry that he is not the actual owner of the merchandise, (2) he furnishes the name and address of such owner, and (3) within ninety days from the date of entry he produces a declaration of such owner conditioned that he will pay all additional and increased duties, under such regulations as the Secretary of the Treasury may prescribe. Such owner shall possess all the rights of a consignee."

19 U.S.C. 1514:

"Except as provided in subdivision (b) of section 1516 of this title (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), and his decisions excluding any merchandise from entry or delivery, under any provision of the customs laws, and his liquidation or re-liquidation of any entry, or refusal to pay any claim for drawback, or his refusal to reliquidate any entry for a clerical

error discovered within one year after the date of entry, or within sixty days after liquidation or reliquidation when such liquidation or reliquidation is made more than ten months after the date of entry, shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and conclusive upon all persons (including the United States and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction, or filing such claim for drawback, or seeking such entry or delivery, shall, within sixty days after, but not before such liquidation, reliquidation, decision, or refusal, as the case may be, as well in cases of merchandise entered in bond as for consumption, file a protest in writing with the collector setting forth distinctly and specifically, and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto."

19 U.S.C. 1515:

"Upon the filing of such protest the collector shall within ninety days thereafter review his decision, and may modify the same in whole or in part and thereafter remit or refund any duties, charge, or exaction found to have been assessed or collected in excess, or pay any drawback found due, of which notice shall be given as in the case of the original liquidation, and against which protest may be filed within the same time and in the same manner and under the same conditions as against the original liquidation or decision. If the collector shall, upon such review, affirm his original decision, or if a protest shall be filed against his modification of any decision, and, in the case of merchandise entered for consumption, if all duties and charges shall be paid, then the collector shall forthwith transmit the entry and the accompanying papers, and all the exhibits

connected therewith, to the United States Customs Court for due assignment and determination, as provided by law. Such determination shall be final and conclusive upon all persons, and the papers transmitted shall be returned, with the decision and judgment order thereon, to the collector, who shall take action accordingly, except in cases in which an appeal shall be filed in the United States Court of Customs and Patent Appeals within the time and in the manner provided by law."

28 U.S.C. 1654:

"Appearance personally or by counsel

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein. June 25, 1948, c.646, 62 Stat. 944, amended May 24, 1949, c.139, §91, 63 Stat. 103."

Rule 9, Rules of U. S. Customs Court:

"Appearances.

Parties may appear and manage their cases personally or by attorney duly admitted under the rules of the court to practice at it's bar."

Statement

Petitioner, a custom broker for Amerex Trading Corporation, the owner of the merchandise, protested the Collector's rejection of an entry and demand for a greater duty than that calculated by the petitioner to be due on the declared invoice value (6).[3]

3. Parenthetic references are to the record before the United States Court of Customs and Patent Appeals now certified to this Court, except as otherwise noted.

Entry 991169 (upon which the protest was based) showed petitioner as the consignee and importer of record (7).

No owner's declaration as provided for by 19 U.S.C. 1485(d) was ever filed (28), and so, pursuant to 19 U.S.C. 1483, petitioner was deemed the owner under the Tariff Act of 1930.

Petitioner paid the excess duty demanded by the Collector and thereafter filed a timely protest (6-7).

The protest having been disallowed by the Collector (8), it automatically came before the Customs Court (19 U.S.C. 1515). Thereafter petitioner and respondent stipulated in writing the facts and issue to be submitted to the Customs Court (9-11). No oral hearing was sought or required.

In submitting the stipulation, the government raised no issue or defense concerning the petitioner's capacity to sue or status as the real party in interest under the Tariff Act of 1930. Thereafter, on his own motion and without disclosing the reasons therefor, Judge Richardson, sitting in the Third Division, before which the protest was pending, requested Mr. Carey, the Clerk of the Customs Court, to ask the parties to waive the statutory notice period and appear in person so that he could address certain questions to the late James B. Herzog, then one of the petitioner's partners (12). The nature of the questions was not disclosed by Judge Richardson in his communication to Mr. Carey or directly to Mr. Herzog.

When he appeared before the Third Division, Mr. Herzog was questioned under oath only by Judge Richardson. The questions elicited the following answers:

1) Mr. Herzog held an individual license as a customs broker and the petitioner had a partnership license as such (15).

2) Amerex Trading Corp. was the ultimate consignee and petitioner did not own the goods involved in the entry (15).

3) If successful on the protest, petitioner would receive the refund of duty, but would remit it to Amerex Trading Corp. (16).

4) Neither Mr. Herzog nor the petitioner was receiving a fee for services in connection with the protest (16). (This seems to be a fair reading of the transcript, for Judge Richardson referred, in his questions, to "services of this kind.")

Judge Richardson asked no questions relating to the filing or non-filing of an owner's declaration under 19 U.S.C. 1483, although the customs file clearly reflected that no owner's declaration had been filed.

Thereafter, the Third District, by order dated April 24, 1962, refused to approve the submitted stipulation on the *sole* ground that "* * * one of the signers of the stipulation herein is not an attorney, but a business partnership, and is, therefore, not authorized to act in a representative capacity in the United States Customs Court * * *" (17). Since the stipulation in issue was signed by petitioner as a party, the effect of the order was to terminate the case.

Pursuant to the Rules of the Customs Court made and provided therefor, petitioner moved for reargument and, in the course of so doing, specifically advised the Third District that, "* * * no Owner's Declaration was filed and that the statutory time for such filing has elapsed." (28).

Thereafter, petitioner, by then appearing by counsel for the purposes of the motion for rehearing, and respondent stipulated for submission of briefs to the Third Division on the issues raised by the Court's order and the motion for reargument thereon (32). That stipulation and the briefs to be submitted thereunder were rejected by Judge Richardson (32-33). The motion for reargument was denied by order on June 28, 1962 (33-34).

To both orders here involved, Hon. Mary Donlon dissented (26, 37-39).[4]

Thereafter an appeal was taken to the United States Court of Customs and Patent Appeals. On December 12, 1963, that court unanimously affirmed and remanded the cause to the Customs Court, "for such further proceedings as may be appropriate for disposition of the litigation on its merits" (App. A-12).

The dilemma created by the decision of the Customs Court was left unresolved by the Court of Customs and Patent Appeals. In essence, by collaterally ordering that petitioner not be permitted to appear *pro se*, the case on the merits was actually terminated without a decision on the merits. Both courts had held that the petitioner was not the real party in interest and had no capacity to sue. The Court of Customs and Patent Appeals specifically found that:

> "* * * we are not persuaded as to the efficacy of appellant's contentions that it was the real party in interest and not an agent acting in a representative capacity with the right to appear in person and manage its own cause."

As a matter of fact, such holding was essential in order for the courts below to reach a basis for depriving petitioner of his right to appear in person, for implicit in the opinion below is the finding that if petitioner is the real party in interest he would have the right to appear in person and manage his own cause. With the petitioner barred from proceeding because he is not the real party

4. Judge Donlon dissented to the opinion of April 24, 1962 on the ground, in part, that she did not share the majority view as to the nature of the partnership. In her dissent to the opinion of June 28, 1962, Judge Donlon took issue with the majority's refusal to hear appellant; to a denial of appellant's right to be heard *pro se*; and to the majority's "arbitrary usurpation of the rule-making authority." (37).

in interest, and with the ultimate consignee barred because no owner's declaration was filed (see *E. H. Corrigan* v. *U. S., infra*), the remand for further proceedings becomes illusory, for petitioner cannot participate in further proceedings in the Customs Court. Petitioner was in this fashion deprived of his standing to pursue his cause on its merits, in addition to the other prejudice worked on him by the decisions below.

Reasons For Allowance of the Writ

1.

As is set forth in the opinion of the Court of Customs and Patent Appeals (App. A-8) we deal here with a "final decision" available for review by this Court as defined by *Cohen, et al.* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541.

At issue is a ruling with far-reaching effect involving millions of dollars and a vital segment of the nation's economy. The rulings below affect not only the petitioner, but all importers, all customs brokers, all consignees and all owners who act through consignees in effecting their importations. In urging the broadest possible consideration of the issues involved, the government in its brief to the Court of Customs and Patent Appeals, stated, at page 34:

> "This Court should set to rest, one way or the other, the question whether this principle represents a proper interpretation and application of Customs Court Rule 9 and of 28 U.S.C.A. 1654, as its resolution is obviously important in the conduct of litigation in the Customs Court and is of concern and interest not only to the Court and Bar but to many importers and customhouse brokers."

The Revenue Collection Act of 1799, its successor revenue and tariff acts and the decisions thereunder have

consistently and unqualifiedly held that a consignee of imported merchandise (whether a customs broker, forwarding agent or otherwise) is the owner of the importation for customs purposes. That jural concept has enabled and continues to enable the government to achieve efficient collection of its duties, for it imposes liability on those who act as importers regardless of where true ownership may actually rest. The imposed liability has also consistently been interpreted as lodging in such consignees the right to assert to conclusion any defenses or claims in diminution of or defense to such liability.[5]

In reliance on the foregoing rule of law and the decisions refining its applications, a vast complex of relationships has developed over the years which involves importers, custom brokers, freight forwarders, and the like, and which also involves hundreds of millions of dollars in importations and duties on imports arriving daily through hundreds of ports in the United States.

For the first time in 165 years the relationships, rights and obligations of the importing community to act in reliance on the statutes and cases interpretive thereof have been challenged and thrown into doubt. The challenge has not been offered by the government, but by the Customs Court. An outline of the nature of the challenge appears at a later point hereof. Suffice it to say at this juncture that the impact of the decision is broad, pervasive and hardly overstated by the government's brief (*supra*).

The economic and juridical importance of the issue warrant this Court's consideration.

5. The liability referred to here relates to liability for duty; for additional or increased duties, 19 U. S. C. 1503, 1514; the fraud of a consignor or the owner, 19 U. S. C. 1521, etc.

2.

The Revenue Collection Act of 1799 (c. 128, sec. 36) provided that all goods imported into the United States shall, for the purpose of that act, be deemed and held to be the property of the persons to whom such goods were consigned, any sale, transfer or assignment prior to entry and payment, to the contrary notwithstanding.

Every revenue or tariff act thereafter enacted contained a similar provision. The Tariff Act of 1930 (section 483) now in effect, provides as follows:

> "Sec. 483. Consignee as Owner of Merchandise.
>
> • • • • • •
>
> (1) All merchandise imported into the United States shall be held to be the property of the person to whom the same is consigned; and the holder of a bill of lading duly endorsed by the consignee therein named, or, if consigned to order, by the consignor, shall be deemed the consignee thereof. • • •"

The cases interpreting the rights and obligations of consignees under the provisions above referred to, have also had a long history of consistent application.

In 1829, *Knox* v. *Dercins*, 5 Mason 380 (482), Fed. Cas. No. 7,905, held that under the Revenue Collection Act of 1799 and regardless who actually owned the imported goods, the consignee was to be treated as the real owner and liable for the duty.

See also,

Baldwin v. *U. S.*, 113 Fed. 217, cert den. 184 U. S. 700.

As Mr. Justice Story stated in *Knox*:

> "it (the law) does not choose to trust to the uncertain results of other evidence to establish the true

> ownership; but it adopts a convenient and easy rule, by which to guide public officers promptly in their duty, *as well as parties in their responsibility.*" (Emphasis supplied.)

The only partial relief accorded a consignee from complete liability as the owner (for all customs purposes) comes from section 485(d) of the Tariff Act of 1930 which permits the consignee to escape liability for *additional* duties if an owner's declaration, signed by the owner, is filed within the statutory ninety day period provided by the Act. In the case at bar no such declaration had been filed by the owner. Failing the filing of such a declaration, the full and unqualified liability of the consignee as owner continues undiminished.

The scheme of liability for tariff purposes as provided by the statutes and enforced by the cases—up until the case at bar—has been consistently fixed as follows:

> a) On the original entry the consignee is fully liable and also has available to him in his own name all the remedies provided by law as if the owner of the merchandise;
>
> b) For any additional duties or assessments the consignee is likewise liable and also has the same remedies in his own name as if the owner—*unless* an owner's declaration is filed within the statutory period.

It was on the basis of the foregoing rules of law that the entire complex of relationships between importers, customs brokers, forwarding agents, factors, and banks developed over the past 165 years to its present form.

Now, for the first time, in order to achieve a collateral result, the courts below have ignored such relationships and cast them into doubt and confusion.

Without attempting a chronological development of the case law, and until the case at bar, the following cases illustrate the stability of the law as previously defined and upon which the entire importing community relied.

In *American Shipping Company* v. *U. S.*, 10 Cust. Ct. 300, the petitioner's entry revealed that it was acting solely as agent for the true owner. The government in that case argued and sustained its position that petitioner was the principal in the importation and liable for the additional duties sought to be collected."

See also,

M. M. Dalgow v. *U. S.*, 48 Cust. Ct. 343, Abstract 66475;

National Carloading Corp. v. *U. S.*, 16 Cust. Ct. 438, C.D. 1001;

Hensel, Brackman & Lobribacher, Inc. v. *U. S.*, 13 Ct. Cust. App. 498, T. D. 41377.

In *Thomas Magiannis* v. *U. S.* (Court of Claims) 61 Treas. Dec. 348, T. D. 45471, the court refused to recognize the fact that the true owner had supplied the funds which the consignee used to pay the duty. It sustained the government's right to offset an unrelated claim against the consignee against the remission of duties. Even though the true owner supplied the money for the duty, and in equity was entitled to the monies (and this was undisputed by the consignee), the court held, as page 349:

> "The plaintiff is an entire stranger to the record so far as the importation of the goods and the payment of customs duties are concerned."

In *Richards* v. *U. S.*, 24 C.C.P.A. (Customs) 243, 70 Treas. Dec. 800, T. D. 48670, it was held that a consignee

had the right to maintain an action in his own name for remission of duties even though he was acting for a disclosed owner.

See also,

Benioff v. *U. S.*, 24 Cust. Ct. 487, Abs. 54389, rehearing denied 25 Cust. Ct. 298, Abs. 54786.

In *U. S.* v. *Daniel F. Young, Inc.*, 46 F. Supp. 373, it was held that responsibility for the original entry and the liabilities attendant thereon, continued as obligations of the consignee *even after an owner's declaration was filed.* In that case, the consignee was charged with the obligation to return the imported merchandise to customs custody, regardless of the fact that the merchandise was in the possession or control of the real owner.

In *E. H. Corrigan* v. *U. S.*, 35 C.C.P.A. (Customs) 10, C.A.D. 364, it was held that although only the owner could sue for remission of *additional* duty *because* an owner's declaration had been filed, his right so to do derived only from the timely filing of an owner's declaration. The Court unequivocally stated:

> "The situation would be quite different were it not for the filing of the declaration of ownership, which in this case we think is a controlling consideration."

See also,

Erskine v. *U. S.*, 85 F. 2d 690 (C.C.A.9).

In *Matter of Chemo Pure Manufacturing Corp.*, 202 F. Supp. 140, the fact that the owner went bankrupt before additional duties were assessed, did not relieve the consignee of liability for such duties where no owner's

declaration had been filed. As District Judge Dawson stated, at page 141:

> "It seems clear that the petitioner was paying its own debt. As importer of record and consignee, petitioner was made primarily responsible for the payment of duties on the entered goods, 19 U.S.C.A. §1483."

The liability of a consignee is not only civil. It may also be criminal. *U. S.* v. *Fawcett*, 86 Fed. 900.

In each of the cited cases the consignee was not the true owner of the imported merchandise and the fact that the consignee was only an agent was disclosed by the record. In no case did any court hold or suggest that such consignee was not the real party in interest.

Research has failed to reveal a single case where an owner's declaration was not filed, and where a consignee was denied the capacity of a real party in interest for any customs purpose or any customs litigation.[6]

To now hold that such a consignee is not the real party in interest so as to deprive him of his statutory and common law right to conduct his own litigation, represents such a sharp break with the past as to warrant this Court's interest.

Implicit in the holding of the Court of Customs Appeals is the finding that whereas in the past the consignee was always the real party in interest, now he may or may not be such real party in interest as the Customs Court may hereafter determine. Where, for 165 years, status has been fixed, it has now suddenly become uncertain.

Consignees such as petitioner perform a real economic function in the commercial life of the United States. They

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6. Neither the Customs Court nor the Court of Customs and Patent Appeals cited a single case relating to customs or the tariff to support their novel holdings.

perform a real and vital service to an important segment of our commercial community. To now hold that their standing, right and ability to defend themselves against the severe strictures and liability imposed on them by law is open to doubt and to hold that they do not have the right to appear in person to defend themselves, exposes them to a prejudice which must of necessity have an impact on the economic life of the nation, for they must now seek collateral avenues of defense and until they find them must, perforce, curtail their activities and hence their exposure. As agents, their right to act, under the reasoning below, can now be termed a performance of legal services to be rendered only by an attorney duly admitted to the Customs Court (and the advising on tariff liabilities and duties and preparation of legal documents even for submission to the Treasury Department is practising law) and a time-honored, vital and important function is now subject to attack as illegal.

3.

In the cases cited in point 2, some of the consignees were customs brokers and some were not. In all of the cases the fact of agency was known and undisputed. The decisions made no distinction by reason of the agency.

Implicit in the opinions below is the holding that when a customs broker is a consignee, he may not appear in person, but all other consignees may. Equally implicit in the opinions is the holding that consignees other than customs brokers are parties to whom 28 U.S.C. 1654 is available, but consignees who are customs brokers are parties barred from the benefits of 28 U.S.C. 1654. There is no statutory or decisional authority for such a distinction.

The denial of the equal application and protection of the statute to petitioner in the case at bar and the consequent violation of the due process clause of the Fifth Amendment, is self-evident and warrants this Court's intercession because of the individual prejudice to petitioner as a member of a large economic class, all of whose members now stand prejudiced by such holding.

4.

The case of *Heiskell* v. *Mozie*, 82 F. 2d 861, relied on by the Court of Customs and Patent Appeals, is manifestly inapplicable, for in the case at bar we deal with statutory rights and obligations. If common law rules of agency applied, as distinct from statutory impositions, no consignee not the owner could ever be liable for any customs duties, assessments or penalties so long as such consignee did not violate the terms of his agency, and none of the cases cited could have occurred, for in none of those cases were the consignees the real parties in interest as such term is defined in law.

That the courts below had to travel outside the tariff statutes and the cases decided thereunder to find a basis for their unique holding, reveals the extent of the break with long-standing decisional precedent.

5.

The failure of the opinion of the Court of Customs and Patent Appeals to even mention the partnership issue, so heavily relied upon by the Custom Court opinion, justifies the conclusion that such issue was of no relevance to the issues at bar and was not considered of any significance.

In any event, that issue has been mooted by the death of Mr. Herzog. Only one partner remains so far as this litigation is concerned. The partnership has become a sole proprietorship.

CONCLUSION

It is respectfully submitted that the legal and economic detriment created by the decisions below are of such national significance as to warrant this Court's review.

Respectfully submitted,

LEONARD FELDMAN,
Attorney for Petitioner.

APPENDIX

Opinion

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

OCTOBER TERM— 1963

CUSTOMS APPEAL NO. 5118

S. STERN & COMPANY,
Appellant,

v.

THE UNITED STATES,
Appellee.

December 12, 1963

ALMOND, Judge.

Appellant, S. Stern & Company, a customs brokerage partnership, appeals from an order of the United States Customs Court, Third Division[1] declining to receive and recognize a proffered stipulation of submission subscribed on appellant's behalf by one of its partners, James B. Herzog. The stipulation was likewise subscribed by appellee. The trial court's decision was predicated on its determination *ex mero motu* that the appearance by or through a lay member of the partnership constituted the unauthorized practice of law. Motion for rehearing filed through counsel, appearing specially for the plaintiff-appellant solely for the purposes of said motion, was

1. 48 Cust. Ct. 430, Abstract 66718.

denied.[2] From the original order rejecting the stipulation and the order denying the motion for rehearing, one judge dissented. The court below did not reach the merits of the protest, the order reciting that it was "without prejudice to the resubmission of the stipulation by the appropriate authorized persons."

Our resolution of the issue here presented, viz., the authority of the court below to decline to receive and recognize the stipulation on the ground stated, requires that the cause be remanded to the trial court for such further proceedings as may be appropriate for disposition of the litigation on its merits.

The proffered stipulation submitted, subject to the approval of the court, is as follows:

> 1. That the merchandise covered by the above protest consists of 750 sets of transistor radios and accessories, exported from Japan on or about December 25th, 1950 (*sic*), to New York on the S.S. YAMAWAKA MARU. The Special Customs Invoice covering the importation reflected price of $6.00 per unit, which included $5.50 per radio set, 30 cents per pair of earphones, and 20 cents per leather carrying case.
>
> 2. That on the date of exportation the imported merchandise was subject to a minimum export price as established by the International Trade Bureau of the Ministry of International Trade and Industry (hereinafter referred to as MITI) as follows:
>
> $11.00 per radio set, 30 cents per set of earphones, 20 cents per leather case, 18 cents per set of batteries.

2. 49 Cust. Ct. 167, Abstract 66881.

Opinion

3. That at the time of the importation herein involved it was the practice of the appraiser to appraise merchandise similar to that involved herein on the basis of the MITI check prices noted above.

4. That on January 19th, 1961, a consumption entry, with duty calculated on the invoice values, was tendered to the Entry Division of the Collector's office and assigned No. 901469.

5. That the Entry Division rejected the tender of the entry based upon the value indicated on the submitted Special Customs Invoice and required as conditions precedent to the acceptance of said entry that the entry reflect the MITI check prices noted above and that estimated duty computed at those MITI prices be deposited.

6. That the importer thereafter added to the originally tendered entered value so as to reflect the MITI check prices indicated above, noting on the entry papers that

> "Collector has refused entry based on invoice prices which importer claims to be dutiable value and on which value importer originally offered entry. Since importer needs the merchandise he is entering, under protest, at the value demanded by the Collector"

that estimated duties computed at said MITI check prices were deposited on January 25, 1961, and that on said date, consumption entry No. 901469 was accepted by the Entry Division of the Collector's office and a permit for delivery issued.

7. That the protest be deemed submitted on this stipulation.

8. That Plaintiff shall have thirty days after submission of this case in which to file a brief and that Defendant shall have thirty days thereafter in which to file a reply brief.

As noted hereinabove, the stipulation was signed on behalf of the United States and signed on appellant's behalf in the following manner:

S. Stern, Henry & Co.
Plaintiff

By James B. Herzog
Partner

The protest was placed on the court calendar for a hearing in respect thereto. On the date of the hearing appearances were entered by Herzog and the appellee. The court called Herzog to the stand and proceeded to examine him under oath with respect to his role, and that of the partnership of which he was a member, in the filing and prosecution of the protest. The testimony thus elicited disclosed that Herzog is a customs broker holding an individual license; that he is a member of appellant partnership, which is also licensed; that he is not a member of the legal profession; that a customs broker "is the intermediary between the importer and the Customs"; that as a partner he participated with the Government in the preparation of the stipulation; that the partnership did not own the goods absolutely but was functioning "only in a representative capacity" for the ultimate consignee, the Amerex Trading Corporation; that in the event of a recovery of the refund sought, Stern, Henry &

Co. would receive it and "remit all of it immediately to the Amerex Trading Corporation." Herzog testified that neither he nor the partnership would receive a fee for its or his services "of this kind." He asked leave to file a brief in this case and stated, "we submit on the basis of the stipulation." No owner's declaration was filed.

It appears that entry No. 901169 listed Amerex Trading Corporation as the principal for whose account appellant acted. In making entry, appellant filed an *order* bill of lading bearing the endorsement of the consignor thus qualifying under the administrative provisions of 19 U.S.C. 1483, rendering the goods as the property of such *consignee*. Appellant noted the value of the goods on the entry document. The value indicated by appellant was rejected by the Collector of Customs as being too low. In order to secure release of the goods for the use of its principal, Amerex Trading Corporation, appellant was required to increase such value to the minimum export price established by the Ministry of International Trade and Industry. Thereupon, appellant filed protest in its own name under 19 U.S.C. 1514 which protest forms the basis of the stipulation, hereinabove recited, culminating in the proceedings before the Customs Court seeking a refund of the alleged overpayment. These proceedings were instituted in the name of the appellant partnership S. Stern, Henry & Co. (now S. Stern & Company) by James B. Herzog, Partner, for a recovery for and on behalf of appellant's principal, Amerex Trading Corporation, the ultimate consignee.

The order of the Customs Court from which this appeal was taken recites:

> It having appeared to the court that one of the signers of the stipulation herein is not an attorney,

but a business partnership, and is, therefore, not authorized to act in a representative capacity in the United States Customs Court (See memorandum attached) it is

ORDERED that the stipulation is not approved.

This order is without prejudice to the resubmission of the stipulation by the appropriate authorized persons.

The memorandum opinion of the majority of the court below is represented in essence by the following extracts therefrom:

> A party-plaintiff may be an individual, a corporation, or an association. The individual is the only party-plaintiff who can appear and manage his case *personally*. Neither a corporation nor a partnership can physically appear *personally*.
>
> * * * * *
>
> Rule 9[3] of the Customs Court permits parties *to appear personally and manage their cases*. It does not permit parties *to appear in a representative capacity and manage cases for others*, unless they are attorneys duly admitted under the rules of the court to practice at its bar (Emphasis Customs Court.)

It is clearly manifest that Rule 9 of the Customs Court is wholly in consonance with 28 U.S.C. 1654, which provides:

> §1654. Appearance personally or by counsel.

3. Rule 9 provides:
Parties may appear and manage their cases personally or by attorney duly admitted under the rules of the court to practice at its bar.

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

As we proceed to express our views relative to the issue here presented, we deem it pertinent and proper to acknowledge the assistance afforded by the able arguments made and briefs filed by counsel for the appellant and appellee and those submitted, *amici curiae*, by the New York County Lawyers' Association and the Association of the Customs Bar. We deem it proper to note also that the role herein of the United States, appellee, is in essence that of *amicus curiae*.

At the threshold we take cognizance of the issue implied, if not raised, which poses the question of whether the order complained of is a final order or otherwise subject to appeal, or whether it is interlocutory and not appealable. Appellee "is constrained not to oppose the appeal on the ground that the order is not subject to review," while appellant asserts the appealability of the order.

It is well settled that consent of parties litigant is never sufficient to confer jurisdiction. It is the duty of the court to take cognizance, *ex mero motu*, of its power, or jurisdiction, to entertain causes which it is called upon to adjudicate. This court's jurisdiction extends only to review of "final decisions" of the court below. 28 U.S.C. 1541.

As previously adverted to, the trial court did not reach the merits of the protest nor did it dismiss the action but retained jurisdiction of the cause for "resubmission

of the stipulation by the appropriate authorized persons." The order, however, did encompass and make final disposition of an issue collateral to the merits of the main issue raised relative to the protest. The appellant appeared and sought to maintain his asserted right to proceed through representation by a lay partner. The order is a final adjudication in denial of an asserted right. The order precluded the appellant from proceeding further to secure adjudication of its claim embraced by the stipulation. In our view the order meets the pertinent tests relating to the review of collateral orders, *Cohen et al.* v. *Beneficial Industrial Loan Corp. et al.*, 337 U. S. 541, and constitutes a "final decision" within the purview of 28 U.S.C. 1541.

In the view we take of the issue here presented, the questions succinctly posed for proper resolution are stated in the brief *amicus curiae* of the New York County Lawyers' Association. They are:

> 1. Did the trial court commit error in finding on the basis of the record that appellant was acting solely in a *representative* capacity in this case?
>
> 2. Is not the interpretation of a Rule of practice by the court which promulgated it conclusive, granted the absence of any invasion of the substantive rights of a litigant?

The record before us reveals beyond peradventure of doubt, indeed by appellant's testimony under oath, that its appearance in the trial court for the purpose of maintaining the protest was solely in a representative capacity. The record conclusively negates appellant's contention

that it appeared as the real party in interest and therefore qualified under Rule 9, *supra*, to manage the case of another entitled to "all of" the recovery sought "immediately." In response to inquiry directed by the court in lawful exercise of its inherent authority to secure compliance with its Rule, promulgated and extant, appellant disclosed itself as agent acting for its principal, the Amerex Trading Corporation.

It is true that appellant qualified as the consignee when it produced at the time of entry an order bill of lading duly endorsed by the consignor. That qualification, however, under 19 U.S.C. 1483(1) was "For the purposes of this subtitle," which is "Subtitle IV—Administrative Provisions," and not in diminution of the relationship of principal and agent existing between appellant and Amerex Trading Corporation.

Appellant's contention that it was acting for itself and not in a representative capacity is not consistent with the definition which appears in 19 CFR 31.3(a):

> (a) "Customhouse broker" includes any person who, *acting on behalf of others*, transacts customs business * * *. [Emphasis supplied.]

We have examined the imposing array of cases relied upon by appellant. It would serve no useful purpose to analyze these cases in detail as they do not establish that a customhouse broker in the role of statutory consignee may not be recognized and treated as an agent when the purpose for so considering him is in regulation of the practice of law before the bar of the trial court. While the customhouse broker, in the absence of filing an owner's declaration, is *deemed* the owner for certain customs pur-

poses, he is nevertheless an agent for purposes of conducting litigation and managing cases in court and must, therefore, be properly represented by counsel.

In consideration of the record and the arguments here presented, we are not persuaded as to the efficacy of appellant's contentions that it was the real party in interest and not an agent acting in a representative capacity with the right to appear in person and manage its own cause.

Implicit in this appeal is the right of a court to promulgate rules and to interpret them as adjuncts to the dispensation of justice and the orderly and expedient administration of its functions, with the limitation that substantial rights of litigants be not unduly circumscribed. We consider this a right adhering in the very nature of our courts, affirmed in 28 U.S.C. 2071, which provides:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

As we have already noted, the right of parties to plead their own cases is encompassed by the provisions of 28 U.S.C. 1654. This right is recognized by the trial court in Rule 9 of the United States Customs Court. We agree with the trial court that permission to "appear personally and manage their cases" is so clear that it forecloses a construction that would permit parties to "appear in a representative capacity and manage cases for others," unless they are duly admitted members of the bar of the trial court. This interpretation is in harmony with the overwhelming weight of apposite authority.

Heiskell v. *Mozie*, 82 F. 2d 861, 65 App. D.C. 255 (1936) dealt with 28 U.S.C. 394, the predecessor provision of 28 U.S.C. 1654, *supra*. The court said:

> We think the words "the parties," as used in the statute, mean the parties in interest—the real beneficial owners of the claims asserted in the suit, and by implication that it excludes agents and attorneys in fact and confines the representation, where the party whose rights are actually involved does not appear in person, to attorneys and counsellors at law.
>
> * * * * * *
>
> While, therefore, the right to manage one's own cause personally is preserved and secured in all courts, federal and state, the right has never been enlarged to include—by appointment or substitution—an agent. The question is whether the person offering to conduct the litigation is the real party in interest. To determine this, courts look through the shadow to the substance. Here petitioner has no legal title to the property, nor any present equitable interest.

Suffice it to say, in our opinion the trial court has applied a reasonable interpretation in the application of Rule 9, *supra*, to the factual situation here presented. In so doing, it has followed precedent. Its decision should not be disturbed. We accordingly *affirm* that decision and *remand* the cause to the trial court for such further proceedings or orders as shall be appropriate.

Affirmed and Remanded.

Order

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 12th day of December A.D. 1963.

* * * * *

Customs Appeal No. 5118

S. STERN & COMPANY,
Appellant,

v.

THE UNITED STATES,
Appellee.

Said appeal having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is:

ORDERED that the judgment of the United States Customs Court be, and the same is hereby, affirmed and said cause is remanded to the Customs Court for such further proceedings or orders as shall be appropriate.

I, MARY A. YOUNG, Clerk of the United States Court of Customs and Patent Appeals, do hereby certify that the above is a true and correct copy of the order made in the above-entitled case on the 12th day of December, A.D. 1963.

Witness my hand and the seal of this court this 20th day of January, A.D. 1964.

MARY A. YOUNG

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 902

S. STERN & COMPANY, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Customs Court appear at 48 Cust. Ct. 430 and 49 Cust. Ct. 167. The opinion of the Court of Customs and Patent Appeals (Pet. App. 1-11) is not yet reported.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on December 12, 1963. The petition for a writ of certiorari was filed on March 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

726-697—64

QUESTION PRESENTED

Whether the Customs Court may promulgate a rule of practice which requires a customs brokerage partnership to appear by a member of the bar of that court in litigation concerning imported merchandise which is owned by a corporation on whose behalf the brokerage partnership instituted suit.

STATUTES AND RULES INVOLVED

1. Section 483 of the Tariff Act of 1930, 46 Stat. 721, 19 U.S.C. 1483, provides in pertinent part:

> For the purposes of this title—(1) All merchandise imported into the United States shall be held to be the property of the person to whom the same is consigned; and the holder of a bill of lading duly indorsed by the consignee therein named, or, if consigned to order, by the consignor, shall be deemed the consignee thereof. * * *

2. Section 485(d) of the Tariff Act of 1930, 46 Stat. 724, 19 U.S.C. 1485(d), provides:

> A consignee shall not be liable for any additional or increased duties if (1) he declares at the time of entry that he is not the actual owner of the merchandise, (2) he furnishes the name and address of such owner, and (3) within ninety days from the date of entry he produces a declaration of such owner conditioned that he will pay all additional and increased duties, under such regulations as the Secretary of the Treasury may prescribe. Such owner shall possess all the rights of a consignee.

3. Section 1654 of Title 28 provides:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

4. Section 2071 of Title 28 provides:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

5. Rule 9 of the Customs Court's Rules of Practice provides:

> Appearances.
> Parties may appear and manage their cases personally or by attorney duly admitted under the rules of the court to practice at its bar.

STATEMENT

This action was instituted by petitioner's predecessor (S. Stern, Henry & Co.) in the Customs Court by the filing of a protest under Section 514 of the Tariff Act of 1930, 19 U.S.C. 1514, against the assessment of duties on importations of transistor radios and accessories. Thereafter, petitioner and the government proffered to the Customs Court a written stipulation setting forth the facts agreed upon by the parties and necessary for disposition of the protest. The stipulation was signed in petitioner's behalf in the following manner: "S. Stern, Henry & Co. Plaintiff By James B. Herzog Part-

ner."[1] A hearing on the protest was held, at which Herzog entered the appearance on behalf of petitioner.

At that time, the Customs Court *sua sponte* raised the question as to whether, consistent with Rule 9 of its Rules of Practice, Herzog could represent the partnership in the litigation. Upon inquiry of Herzog, who was a layman, it was disclosed that the partnership did not own the merchandise. Rather, as a customs broker, it was serving solely in a representative capacity for the Amerex Trading Corporation which had purchased the radios and accessories from the foreign source and was the owner of the importations. Herzog testified that the partnership would immediately remit to Amerex the entire amount of any refund of customs duties which would result from a successful prosecution of the litigation. It also appeared that the customs entry with respect to the merchandise listed Amerex as the principal for whose account the partnership acted.

On April 24, 1962, the Customs Court entered an order disapproving the stipulation on two grounds: (1) under its Rule 9, *supra*, p. 3, a partnership may appear only by an attorney; and (2) in any event, Herzog's testimony had disclosed that the partnership

[1] As noted by petitioner (Pet. 1), when this action was instituted, there were three partners constituting the firm of S. Stern Henry & Co. After entry of the order of the Customs Court, but prior to argument in the Court of Customs and Patent Appeals, one of the partners died and the partnership name was changed to S. Stern & Company. After entry of the latter court's judgment, James B. Herzog, the partner who signed the stipulation, died. Accordingly, petitioner is now an individual proprietorship and not a partnership.

was acting in a representative capacity and in reality Herzog was endeavoring to appear on behalf of Amerex, the true owner of the imported merchandise. The court's order stated that it was "without prejudice to the resubmission of the stipulation by the appropriate authorized persons." On June 28, 1962, petitioner's application for rehearing was denied.

On December 12, 1963, the Court of Customs and Patent Appeals affirmed. It concluded that the record clearly established that petitioner's maintenance of the protest was solely in a representative capacity and that Rule 9 precluded Herzog, a layman, from appearing in the Customs Court on behalf of Amerex (Pet. App. 10).

ARGUMENT

The petition for certiorari should be denied. As both courts below recognized, the record conclusively establishes that this action was brought by petitioner as the representative of the purchaser and actual owner of the merchandise, the Amerex Trading Corporation. In these circumstances, under Rule 9 of the Customs Court, petitioner was required to appear by an attorney admitted to the bar of that court. The only exception provided in that Rule to the requirement of representation by counsel—*viz.*, that "parties may appear and manage their cases personally"—was reasonably construed by the courts below as having no application where suit is instituted in the name of a nominal plaintiff who is acting solely in a representative capacity for another.

Rule 9 is plainly valid as thus construed by the court promulgating it. Section 2071 of Title 28,

supra, p. 3, expressly confers authority upon the courts of the United States to prescribe rules of practice, consistent with Acts of Congress and the rules prescribed by this Court. Rule 9 is simply a restatement of 28 U.S.C. 1654, *supra,* p. 3, which permits parties without attorneys only to "plead and conduct *their own* cases personally * * *" (emphasis supplied). The court below held that the present proceeding was Amerex's case, not petitioner's, and this conclusion is amply supported by the record.

There is no substance to petitioner's contention that, in applying Rule 9 and 28 U.S.C. 1654, the Customs Court was precluded from looking through form to substance and from giving effect to the fact that petitioner's role was merely that of a broker prosecuting a claim on its principal's behalf. Petitioner points (Pet. 12–13) to Sections 483 and 485(d) of the Tariff Act, 19 U.S.C. 1483 and 1485(d), *supra,* p. 2, which make a consignee such as petitioner liable for the customs duty. Neither of these sections, however, supports petitioner's apparent belief that, for all purposes, a nominal consignee of imported merchandise must be regarded as the owner. On the contrary, Section 483 provides that the consignee shall be deemed the owner only for the purpose of insuring that the custom duties are paid. Cf. *Meredith* v. *United States,* 13 Pet. 486. This does not mean, as petitioner suggests (Pet. 9–10), that the petitioner is now barred from suing in its own name as the consignee of the merchandise imported. Section 483 makes petitioner a party with sufficient interest to conduct litigation. Rule 9 simply provides

that this litigation must be conducted on behalf of petitioner by an attorney, although the true owner could proceed *pro se*.

Not only is there nothing in the Tariff Act requiring that a nominal consignee be treated as the owner of the imported merchandise who is entitled to conduct litigation *pro se* by virtue of 28 U.S.C. 1654 and Rule 9, but it is scarcely likely that Congress would authorize the widespread practice of law by customs brokerage firms comprised of laymen. Under petitioner's theory, any customs broker could obtain the right to represent his principal in the Customs Court and the Court of Customs and Patent Appeals through the simple expedient of entering the merchandise in the name of the broker rather than that of the principal.[2]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

ARCHIBALD COX,
Solicitor General.
JOHN W. DOUGLAS,
Assistant Attorney General.
ALAN S. ROSENTHAL,
MARTIN JACOBS,
Attorneys.

APRIL 1964.

[2] In view of these considerations, there is no need for this Court to consider the alternative ground assigned by the Customs Court: *i.e.*, that a partnership must always be represented by counsel. Moreover, this question is probably moot since petitioner is now a sole proprietorship. See n. 1, *supra*, p. 4.

U. S. GOVERNMENT PRINTING OFFICE: 1964